Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)-1746 OF 2010 AND B-02(IM)-1747 OF 2010
LOW HOP BING, SYED AHMAD HELMY AND ZAHARAH IBRAHIM JJCA
1 OCTOBER 2010

Arbitration — Agreement — Principal agreement contained arbitration clause — Supplemental agreements included 'the submission to court jurisdiction clauses' with no mention of arbitration — Arbitration or litigation — Construction of arbitration clause in light of 'the submission to court jurisdiction clauses' — Whether word 'may' used in arbitration clause connoted reference to arbitration only optional and not mandatory — Whether parties original intention to refer dispute to arbitration abandoned by supplemental agreements — Whether parties estopped from referring dispute to arbitration — Arbitration Act 2005 s 10(1)(a)

The appellant had entered into a total of six agreements, namely the principal agreement entered into on 27 February 2003 and five other supplemental agreements, with the respondent. When disputes arose between the parties, the appellant commenced proceedings against the respondent in the High Court. However, the respondent informed the appellant of its intention to have these disputes referred to arbitration. The respondent then applied to the High Court for a stay of proceedings pending its reference to arbitration. The appellant objected to the stay application. On 7 June 2010, the High Court allowed the stay and referred the High Court actions to arbitration. This was the appellant's appeal against that decision. It was the appellant's contention that the word 'may' instead of 'shall' in cl 11.1 ('the arbitration clause') in the principal agreement, connoted that reference to arbitration was only optional and not mandatory, as the parties had not intended arbitration to be exclusive. The appellant further submitted that the parties had not included the arbitration clause in the five other supplemental agreements but had instead included the 'submission to court jurisdiction clauses' in the second and third supplemental agreements. As such, the appellant contended that this led to the irresistible conclusion that the parties had intended to resort to litigation and not arbitration and the arbitration clause was null and void, inoperative or incapable of being performed under s 10(1)(a) of the Arbitration Act 2005 ('the Act'). The respondent submitted that it did not matter whether the arbitration clause contained the word 'may' or 'shall' and in all cases, notwithstanding the word used, the court had an overriding discretion. The respondent further submitted that since the arbitration clause had not been amended, deleted or varied by the supplemental agreements, 'the submission to court jurisdiction

clauses' should be read harmoniously with the arbitration clause as they complemented one another. The respondent thus contended that the court should not usurp the function of the arbitral tribunal to decide on the issue of the existence or validity of the arbitration agreement.

Held, allowing the appeal with costs:

(1) By cl 11.1, ie the arbitration clause in the principal agreement, the parties had agreed to resolve any dispute between them in connection with the principal agreement by referring the dispute to arbitration. However, in the later supplemental agreements the parties had reaffirmed their express predominant agreement to submit to the court's jurisdiction and had effectively abandoned arbitration. Upon reading all these clauses conjunctively, it was found that there was a conflict in the interpretation of the arbitration clause in the principal agreement and the 'the submission to court jurisdiction clauses' found in the second and third supplemental agreements. They contradicted each other because effect could not be given to enable these clauses to function harmoniously. It was simply impossible to have a concurrent and combined situation of arbitration and litigation, as it was either arbitration or litigation. As such, the arbitration clause had been rendered null and void, inoperative or incapable of being performed under s 10(1)(a) of the Act, by virtue of 'the submission to court jurisdiction clauses' (see paras 29 & 33).

(2) In addition the permissive word 'may' used in the arbitration clause unlike the peremptory word 'shall' showed that the parties were capable of readily abandoning the discretion to refer to arbitration, and opting for litigation instead. This construction was further strengthened when the parties had contractually agreed that the principal agreement including the word 'may' in the arbitration clause shall be read subject to the 'the submission to court jurisdiction clauses' in the supplemental agreements which shall prevail. The High Court action was thus within the jurisdiction of the High Court (see para 30).

(3) As the parties' original intention to proceed by way of arbitration had been subsequently abandoned, as expressed in the second and third supplemental agreements, neither of them should be allowed to go back on their words. The doctrine of estoppel may be invoked (see para 31).

[Bahasa Malaysia summary

Perayu telah menandatangani sejumlah enam perjanjian, iaitu perjanjian utama yang ditandatangani pada 27 Februari 2003 dan lima perjanjian tambahan dengan responden. Apabila pertikaian berbangkit di antara pihak-pihak, perayu memulakan prosiding terhadap responden di Mahkamah Tinggi. Walau bagaimanapun, responden memberitahu perayu mengenai niatnya untuk merujuk pertikaian-pertikaian ini untuk ditimbang tara.

Responden kemudiannya memohon kepada Mahkamah Tinggi untuk penangguhan prosiding sementara menunggu rujukannya ditimbang tara. Perayu membantah terhadap permohonan penangguhan tersebut. Pada 7 Jun 2010, Mahkamah Tinggi membenarkan penangguhan tersebut dan merujuk tindakan-tindakan Mahkamah Tinggi untuk ditimbang tara. Ini adalah rayuan perayu terhadap keputusan tersebut. Ia adalah hujahan perayu bahawa perkataan 'may' instead of 'shall' dalam klausa 11.1 ('klausa timbang tara') dalam perjanjian utama, membayangkan bahawa rujukan untuk ditimbang tara hanya pilihan dan bukan mandatori, kerana pihak-pihak bukan berniat untuk timbang tara menjadi eksklusif. Perayu selanjutnya berhujah bahawa pihak-pihak tidak memasukkan klausa timbang tara di dalam kelima-lima perjanjian tambahan yang lain tetapi sebaliknya memasukkan 'submission to court jurisdiction clauses' di dalam perjanjian-perjanjian tambahan yang kedua dan ketiga. Oleh itu, perayu berhujah bahawa ini membawa kepada kesimpulan yang tidak boleh disangkal bahawa pihak-pihak berniat untuk memilih litigasi dan bukan timbang tara dan klausa timbang tara adalah tidak sah dan terbatal, tidak dapat beroperasi atau dilaksanakan di bawah s 10(1)(a) Akta Timbang Tara 2005 ('Akta'). Responden berhujah bahawa tidak menjadi masalah sama ada klausa timbang tara mengandungi 'may' atau 'shall' dan di dalam kesemua kes, walau apa pun perkataan yang digunakan, mahkamah mempunyai budi bicara mengatasi. Responden selanjutnya berhujah bahawa memandangkan klausa timbang tara tidak dipinda, dipadamkan atau diubah oleh perjanjian-perjanjian tambahan, 'the submission to court jurisdiction clauses' patut dibaca secara harmoni dengan klausa timbang tara memandangkan ia pelengkap di antara satu sama lain. Responden oleh itu berhujah bahawa mahkamah tidak patut merampas fungsi tribunal timbang tara untuk memutuskan mengenai isu kewujudan atau kesahan perjanjian timbang tara tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Melalui klausa 11.1, iaitu klausa timbang tara di dalam perjanjian utama, pihak-pihak telah bersetuju untuk menyelesaikan apa-apa pertikaian di antara mereka berhubung perjanjian utama untuk merujuk pertikaian tersebut untuk di timbang tara. Walau bagaimanapun, di dalam perjanjian-perjanjian tambahan kemudiannya, pihak-pihak telah mengesahkan perjanjian utama yang nyata mereka untuk mematuhi bidang kuasa mahkamah dan telah secara efektif meninggalkan timbang tara. Setelah membaca kesemua klausa-klausa secara berhubung, ia didapati bahawa terdapat konflik di dalam tafsiran klausa timbang tara di dalam perjanjian utama dan 'the submission to court jurisdiction clauses' didapati di dalam perjanjian-perjanjian tambahan kedua dan ketiga. Ia menyanggah satu sama lain kerana penekanan tidak dapat diberikan untuk membuatkan klausa-klausa ini berfungsi secara harmoni. Ia jelas mustahil untuk mempunyai keadaan serentak dan bergabung timbang

tara dan litigasi, kerana sama ada ia adalah timbang tara atau litigasi. Oleh itu, klausa timbang tara diputuskan tidak sah dan terbatal, tidak beroperasi atau tidak boleh dilaksanakan di bawah s 10(1)(a) Akta, mengikut 'the submission to court jurisdiction clauses' (lihat perenggan 29 & 33).

(2) Selanjutnya perkataan permisif 'may' yang digunakan di dalam klausa timbang tara bukan seperti perkataan mesti dipatuhi 'shall' menunjukkan bahawa pihak-pihak berkebolehan untuk sanggup meninggalkan budi bicara untuk merujuk ditimbang tara, dan sebaliknya memilih litigasi. Tafsiran ini selanjutnya dikukuhkan apabila pihak-pihak telah bersetuju secara kontrak bahawa perjanjian utama termasuk perkataan 'may' di dalam klausa timbang tara patut di baca tertakluk kepada 'the submission to court jurisdiction clauses' di dalam perjanjian-perjanjian tambahan yang akan mengatasi. Tindakan Mahkamah Tinggi oleh itu dalam bidang kuasa Mahkamah Tinggi (lihat perenggan 30).

(3) Memandangkan niat asal pihak-pihak untuk meneruskan melalui timbang tara telah kemudiannya ditinggalkan, seperti yang dinyatakan di dalam perjanjian-perjanjian tambahan kedua dan ketiga, kedua-dua pihak tidak patut dibenarkan untuk memungkiri perjanjian mereka. Doktrin estopel boleh dibangkitkan (lihat perenggan 31).]

Notes

For cases on agreement generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1176–1236.

Cases referred to

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656, CA (refd)

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Axa Re v Ace Global Markets Ltd [2006] QBD 683, HC (distd)

Balancing Pool v TransAlta Utilities Corporation [2009] ABQB 631, QB (refd)

Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors [2008] 6 MLJ 817; [2008] 5 CLJ 435, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (folld)

Canadian National Railway Co v Lovat Tunnel Equipment Inc (1999) 174 DLR (4th) 385 (refd)

China State Construction Engineering Corp Guangdong Branch v Madiford Ltd [1992] 1 HKC 320 (refd)

Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corpn Sdn Bhd & Ors [2009] 6 MLJ 729, HC (refd)

CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561; [2008] 1 LNS 543, HC (refd)
Coop International Pte Ltd v Ebel SA [1998] 3 SLR 670, HC (refd)
Cravat Export Co v Taiwan Power Co USDC Eastern District of Kentucky CA 90-11, 5 March 1990 (unreported) (refd)
Dalian Hualiang Enterprise Group Co Ltd and another v Louis Dreyfus Asia Pte Ltd [2005] SGHC 161 [2005] 4 SLR 646, HC (refd)
Daval Aciers d'Usinor et de Sacilor v Armare SRL ('The Nerano') [1996] 1 Lloyd's Rep 1, CA (distd)
Daval Aciers D'Usinor et de Sacilor and others v Armare SRL (The 'Nerano') [1994] 2 Lloyd's Rep 50, HC (distd)
Gulf Canada Resources Ltd v Avochem International Ltd 66 BCLR (2d) 114 (refd)
Innotec Asia Pacific Sdn Bhd v Inotec GMBH [2007] 8 CLJ 304, HC (refd)
Paul Smith Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127 (refd)
PMT Partners Pty Ltd v Australian National Parks and Wildlife Service (1995) 131 ALR 377, HC (distd)
Private Company 'Triple V' Inc v Star (Universal) Co Ltd & Anor [1995] 3 HKC 129 (refd)
R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia [2009] 1 MLJ 572; [2009] 1 CLJ 708, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other applications [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)
Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor [2008] 1 MLJ 233; [2008] 1 CLJ 496, HC (refd)
Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872, HC (refd)
Tianjin Medicine & Health Products Import & Export Corp v JA Moeller (Hong Kong) Ltd [1994] 1 HKC 545 (refd)
Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] SGCA 41 [2009] 4 SLR 732, CA (refd)
Westbury Tubular (M) Sdn Bhd v Ahmad Zaki Sdn Bhd & Ors [2001] 5 CLJ 67, HC (refd)
William Co v Chu Kong Agency Co Ltd & Anor [1993] 3 HKC 377 (distd)
Xu Yi Hong v Chen Ming Han & Ors [2006] 4 HKC 633, HC (distd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
Arbitration Act 1975 [UK] s 1
Arbitration Act 2005 s 10, 10(1), (1)(a)
International Arbitration Act (Cap 143A) s 6

Appeal from: Originating Summons No MT2–24–2186 of 2009 and Suit No 22–1411 of 2009 (High Court, Shah Alam)

Khoo Guan Huat (Ashok Kumar Ranai, Lam Wai Loon, Shannon Rajan and Tan Lai Yee with him) (Skrine) for the appellant.
Loh Siew Cheang (P Gananathan, Olivia Loh, Kelvin Seet, Carol Tiong and Tin Gi Gyn with him) (Cheang & Ariff) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] In both these appeals, the relevant clauses (governing the forum for dispute resolution) became the bone of contention in the Shah Alam High Court. On the application of the defendant, Kuala Dimensi Sdn Bhd ('KDSB'), the High Court invoked s 10 of the Arbitration Act 2005 ('s 10') and granted a stay of proceedings in High Court Writ of Summons No 22–1411 of 2009 and Originating Summons No MT2–24–2186 of 2009 (collectively, 'the High Court actions') pending reference to arbitration. Being dissatisfied, the plaintiff, Port Klang Authority ('PKA'), lodged these appeals against the stay.

FACTUAL BACKGROUND

[2] The parties had entered into a total of six agreements viz:

(a) Principal development agreement dated 27 February 2003 ('DA1');

(b) Supplemental agreement dated 26 May 2003 ('DA2');

(c) Supplemental agreement dated 27 May 2004 ('DA3');

(d) Supplemental agreement for additional development works dated 30 November 2005;

(e) Supplemental agreement for additional development works dated 26 April 2006; and

(f) Supplemental agreement for new development works dated 26 April 2006.

[3] The relevant clauses (contained in DA1, DA2 and DA3) merit reproduction as follows:

(a) DA1 cl 11.1

Settlement of Disputes

If any dispute or difference of any kind whatsoever shall arise between the Parties herein arising out of or in connection with this Agreement (either during the progress or after the completion or abandonment of the

Development Works) it shall if possible be resolved amicably between the Parties. *Any such dispute or difference which cannot be resolved amicably may be referred to arbitration in accordance with this Agreement*. (Emphasis added.)

(b) DA2 cll 2.3 and 2.4

2.3 Subject only to the variations and modification herein contained and such alterations, if any, as may be necessary to make the Principal Agreement consistent with this Supplemental Agreement, the Principal Agreement remains in full force and effect and shall be read and construed and be enforceable as if the terms of this Supplemental Agreement were incorporated therein. *In the event there is any conflict in the interpretation of the terms of the Principal Agreement and this Agreement, the interpretation of the terms of this Supplemental Agreement shall prevail*.

2.4 This Supplemental Agreement shall be governed and construed in all respects in accordance with the laws of Malaysia and *the parties hereto hereby submit to the jurisdiction of the Courts of Malaysia in all matters connected with the obligation and liabilities of the parties under this Supplemental Agreement*. (Emphasis added.)

(c) DA3 cll 4.3 and 4.4

4.3 Subject only to the variations and modification herein contained and such alterations, if any, as may be necessary to make the Principal Agreement consistent with this Supplemental Agreement, the Principal Agreement remains in full force and effect and shall be read and construed and be enforceable as if the terms of this Supplemental Agreement were incorporated therein. *In the event there is any conflict in the interpretation of the terms of the Principal Agreement and this Agreement, the interpretation of the terms of this Supplemental Agreement shall prevail*.

4.4 This Supplemental Agreement shall be governed and construed in all respects in accordance with the laws of Malaysia and *the parties hereto hereby submit to the jurisdiction of the Courts of Malaysia in all matters connected with the obligation and liabilities of the parties under this Supplemental Agreement*. (Emphasis added.)

[4] Subsequently, pursuant to the aforesaid six agreements, disputes arose between the parties, resulting in the commencement of the High Court actions by PKA against KDSB.

[5] After the commencement of the High Court actions, KDSB vide letter dated 27 October 2009 informed PKA of its (KDSB's) intention to have their disputes referred to arbitration.

[6] On 29 October 2009, KDSB applied to the High Court to stay the proceedings in the High Court actions pending reference to arbitration ('the stay applications').

[7] PKA objected to KDSB's stay applications. On 7 June 2010, the High Court allowed the stay and referred the High Court actions to arbitration.

[8] Hence, these appeals by PKA.

ARBITRATION OR LITIGATION?

[9] PKA's learned counsel Mr Khoo Guan Huat (assisted by Mr Ashok Kumar Ranai, Mr Lam Wai Loon, Mr Shannon Rajan and Ms Tan Lai Yee) contended, in essence, that the word 'may' (instead of 'shall') in cl 11.1 DA1 ('the arbitration clause') connotes that reference to arbitration is only optional and not mandatory, as the parties had not intended arbitration to be exclusive. They relied on *Westbury Tubular (M) Sdn Bhd v Ahmad Zaki Sdn Bhd & Ors* [2001] 5 CLJ 67 HC; and *William Co v Chu Kong Agency Co Ltd & Anor* [1993] 3 HKC 377.

[10] It was further submitted for PKA that the arbitration clause has not been subsequently included in the five supplemental development agreements, in which case 'the submission to court jurisdiction clauses' viz cll 2.4 and 4.4 in DA2 and DA3 respectively shall prevail, and the irresistible conclusion is that the parties had intended to resort to litigation, and not arbitration.

[11] KDSB's learned counsel, Dato' Loh Siew Cheang (Mr P Gananathan, Ms Olivia Loh, Mr Kelvin Seet, Ms Carol Tiong and Mr Tin Gi Gyn with him) responded that *Westbury*, cannot support the proposition stretched for PKA as the defendant's application for stay was governed by s 6 of the (then) Arbitration Act 1952 ('s 6'), under which the court always had the discretion to refuse stay if an applicant fails to satisfy the conditions under s 6 and that it did not matter whether the arbitration clause contained the word 'may' or 'shall' and in all cases, notwithstanding the word used, the court had an overriding discretion thereunder.

[12] It was also contended for KDSB that:

(a) PKA's reliance on the Hong Kong case of *William Co*, is misplaced as Kaplan J did not contradict himself in an earlier judgment in *China State Construction Engineering Corp Guangdong Branch v Madiford Ltd* [1992] 1 HKC 320;

(b) Subsequent to *William Co*, in *Tianjin Medicine & Health Products Import & Export Corp v JA Moeller (Hong Kong) Ltd* [1994] 1 HKC 545,

Kaplan J held that an agreement to arbitrate is a bilateral contract and its intrinsic legal quality cannot be displaced or destroyed by the use of the word 'may', citing *Canadian National Railway Co v Lovat Tunnel Equipment Inc* (1999) 174 DLR (4th) 385; and *William Co*; and

(c) Kaplan J is not alone in construing the word 'may' in the context of an arbitration agreement, as support may be found in *Balancing Pool v TransAlta Utilities Corporation* [2009] ABQB 631 (Canada) and *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 131 ALR 377 (Australia).

[13] Next, it was argued for KDSB that the arbitration clause has not been amended, deleted or varied by DA2 and DA3, and that 'the submission to court jurisdiction clauses' should be read harmoniously with the arbitration clause as they complement one another, adding that the court should not usurp the function of the arbitral tribunal to decide on the issue of the existence or validity of the arbitration agreement. The following authorities, inter alia, were relied on:

(a) *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670 (HC Singapore);

(b) *Xu Yi Hong v Chen Ming Han & Ors* [2006] 4 HKC 633 at p 644 (HC);

(c) *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127;

(d) *Daval Aciers D'Usinor et de Sacilor and others v Armare SRL (The 'Nerano')* [1994] 2 Lloyd's Rep 50 at p 54 (HC); *Daval Aciers d'Usinor et de Sacilor v Armare SRL ('The Nerano')* [1996] 1 Lloyd's Rep 1 (CA);

(e) *Axa Re v Ace Global Markets Ltd* [2006] QBD 683 (HC);

(f) *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; [2008] 1 CLJ 496 (HC);

(g) *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corpn Sdn Bhd & Ors* [2009] 6 MLJ 729 (HC);

(h) *Private Company 'Triple V' Inc v Star (Universal) Co Ltd & Anor* [1995] 3 HKC 129; and

(i) *Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] SGCA 41* [2009] 4 SLR 732 (CA Singapore).

[14] The above submissions call for a decision on the following question:

Upon a true construction of 'the arbitration clause' ie cl 11.1 in the principal agreement DA1, and 'the submission to court jurisdiction clauses' viz cll 2.4 and 4.4 in the subsequent supplemental agreements DA2 and DA3 respectively, did the parties intend to abandon arbitration, and instead to resort to litigation, thereby

rendering the 'arbitration clause' null and void, inoperative or incapable of being performed, within the scope of s 10(1)(a) of the Arbitration Act 2005 (s 10(1)(a))?

[15] The answer to the above question would require a detailed discussion of s 10(1)(a) and the authorities cited for the parties herein.

SECTION 10(1)(a)

[16] A good starting point is to examine the scope of s 10(1) which reads:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement *shall*, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration *unless it finds* —
>
> (a) *that the agreement is null and void, inoperative or incapable of being performed*; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred … (Emphasis added.)

[17] Section 10(1) is substantially similar to s 6 of the (Singapore) International Arbitration Act (Cap 143A) which provides:

> 6(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The Court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

[18] In my view, the general rule under s 10(1) is that where proceedings are brought in respect of a matter which is the subject of an arbitration agreement, the peremptory word 'shall' makes it mandatory for the court to grant a stay of those proceedings and refer the parties to arbitration, see eg:

(a) *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817; [2008] 5 CLJ 435 (CA);

(b) *Innotec Asia Pacific Sdn Bhd v Inotec GMBH* [2007] 8 CLJ 304 (HC);

(c) *Standard Chartered Bank Malaysia Bhd*;

(d) *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;

(e) *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561; [2008] 1 LNS 543 (HC);

(f) *Chut Nyak Isham bin Nyak Ariff*; and

(g) *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656 (CA).

[19] In exceptional circumstances (the categories of which are not closed), stay may be refused. Illustrations include:

(a) Under s 10(1)(a), where the court (be it noted, not the arbitral tribunal) finds that the agreement is null and void, inoperative or incapable of being performed. See eg *Standard Chartered Bank Malaysia Bhd*; *Renault SA v Inokom Corp Sdn Bhd & Anor and other applications* [2010] 5 MLJ 394; [2010] 5 CLJ 32 (CA);

(b) '[W]here the party applying for a stay has waived or may be estopped from asserting his rights to insist on arbitration, such as where the parties have agreed subsequently that disputes may be resolved by litigation. The facts of such a case would fall to be decided in accordance with the usual contractual analysis of estoppel and or waiver on the basis that the arbitration agreement is 'inoperative', see s 6(2) of the IAA. There are no impediments, under the IAA, preventing the parties to an arbitration agreement from agreeing to resolve the matter in any manner that they may find more convenient. In such a case, the agreement to arbitrate will be treated as having been waived as the parties are free to modify their agreement at any time': per VK Rajah JA in *Tjong Very Sumito*, in para [54].

(c)

(i) If one of the parties named in the legal proceedings is not a party to the arbitration agreement;

(ii) If the alleged dispute does not come within the terms of the arbitration agreement; or

(iii) If the application is out of time.

per Hinkson JA of the Court of Appeal of British Columbia in *Gulf Canada Resources Ltd v Avochem International Ltd* 66 BCLR (2d) 114 at pp 120–121 (cited in *Dalian Hualiang Enterprise Group Co Ltd and another v Louis Dreyfus Asia Pte Ltd [2005] SGHC 161* [2005] 4 SLR 646 and *Tjong Very Sumito*).

(d) Where a party has taken any other steps in the court proceedings, as stated in s 10(1).

[20] In considering the respective burden of proof under s 6 (Singapore) in *Tjong Very Sumito*, VK Rajah JA opined as follows:

> In order to obtain a stay of proceedings in favour of arbitration under s 6, the party applying for a stay (the applicant) must first show that he is party to an arbitration agreement, and that the proceedings instituted involve a matter which is the subject of the (arbitration) agreement. In other words, the applicant has to show that the proceedings instituted fall within the terms of the arbitration agreement. If the applicant can show that there is an applicable arbitration agreement, then the court must grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, ie that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

AUTHORITIES: CATEGORIES

[21] In deference to the enormous efforts expended by learned counsel respectively, I shall now analyse the authorities cited for the parties.

[22] I shall categorise broadly the authorities in order to decide on their usefulness or otherwise, as follows:

(1) authorities which are readily distinguishable on the facts and/or the issues;

(2) authorities which concern the construction of arbitration clause only;

(3) authorities which concern the construction of arbitration clause alongside 'the governing law' and 'jurisdiction' clauses; and

(4) authorities favouring litigation.

READILY DISTINGUISHABLE AUTHORITIES

[23] These authorities in category (1) include:

(a) The Hong Kong case of *William Co*

(i) The relevant clause provides that 'All disputes arising out of or in connection with this bill of lading shall, in accordance with Chinese law, be resolved in the courts of the People's Republic of China or be arbitrated in the People's Republic of China'. However the plaintiff opted for litigation in Hong Kong. That option was not agreed upon in the contract. Kaplan J granted a stay of the court proceedings in Hong Kong and ordered arbitration in People's Republic of China, adding at p 381A–D that:

> The parties have agreed on arbitration or litigation in China. Once he has made a choice, that is the end of the matter and the defendants will have no say. Once arbitration or litigation in China is chosen, that creates a binding choice to which the court will usually give effect.
>
> …
>
> Thus, it is open to the defendants to exercise their choice in the matter. By applying for a stay …, they have opted for arbitration in China. On this basis, the plaintiff's choice is invalid as it does not come within the range of options agreed upon. …, the defendants are entitled to a stay in favour of arbitration in China because they have made a valid choice from one of the two permissible methods of dispute resolution …

(ii) I note that in *William Co*, the stay was granted on the ground that the plaintiff had opted for litigation in Hong Kong which was not what the parties had contractually agreed in the arbitration clause. Hence, I do not find this authority useful to KDSB.

(b) The Australian case of *PMT Partners Pty Ltd*

The issue is focused on an extension of time. There, cl 45(a) of the agreement provides that all disputes were to be submitted to a 'Superintendent' within 14 days of any dispute arising. Clause 45(b) states that, if dissatisfied with the Superintendent's decision, the appellant could, within 14 days, submit the matter to the respondent. If dissatisfied with the respondent's decision, the appellant could, within 28 days, submit the matter to arbitration. A dispute arose sometime in 1991. In June 1992, the appellant submitted a notice of the dispute to the Superintendent who rejected it as being out of time. In the Supreme Court of the Northern Territory, the appellant obtained an extension of time to submit the notice. The respondent's appeal was allowed by the Court of Appeal of the Northern Territory. In the appellant's final appeal, the High Court (the apex Court in Australia) reinstated the trial judge's order.

(c) It is noteworthy that extension of time is however not an issue for decision in the instant appeals. I am therefore unable to see how KDSB could garner any support from the said Australian case.

CONSTRUCTION OF ARBITRATION CLAUSE ONLY

[24] Illustrations of category (2) include:

(a) *Westbury* of our High Court

(i) This concerns a subcontract to implement the works for the roof system of the Formula One racing circuit facility in Sepang. In the High Court, the plaintiff's claim was for works done, which was

denied by the defendant. The defendant then applied for a stay of proceedings pursuant to s 6 of the Arbitration Act 1952 (now repealed). The court considered the word 'may' in cl 35.1 of the subcontract in the following context:

> 35.1: If any dispute or difference shall arise between the contractor and the sub-contractor … then such dispute shall be settled amicably between the parties. Any such dispute which cannot be settled amicably *may be referred to arbitration* and final decision of a person to be agreed between the parties to act as arbitrator, or failing agreement, of a person nominated on the application of either party by the Director for the time being of the Regional Centre for Arbitration in Kuala Lumpur. (Emphasis added.)

(ii) Section 6 was enacted in the following words:

> 6 Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(iii) In construing cl 35.1 in relation to s 6, Nik Hashim J (later FCJ) held at p 71c–f that the use of the word 'may' in cl 35.1 does not make reference to arbitration mandatory. The relevant portion of the judgment reads as follows:

> On the facts of this case, there is no compulsion on the part of the plaintiff to refer the disputes to arbitration. Unlike in the cases of *Perbadanan Kemajuan Negeri Perak*; *Kien Tat Sdn Bhd v Klockner Industrie – Anlagen GmbH* [1989] 1 MLJ 498; *Lee Brothers Constrution Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459; *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273; [1996] 1 CLJ 231 (FC), which used the phrase '*shall* be referred to arbitration' in their respective arbitration clause, the instant case however, uses the phrase '*may* be referred to arbitration' clause in the subcontract. Thus, to my mind, the usage of the word 'may' in cl 35 suggests that it is not mandatory on the part of the plaintiff to refer the disputes to arbitration. Since it is not a mandatory provision to be bound, the plaintiff cannot therefore be faulted for not exhausting the dispute resolution process by not referring the disputes to arbitration before filing the civil suit. Therefore, the plaintiff's claim is not premature. (Emphasis added.)

(b) The Hong Kong case of *China State Construction Engineering Corp*, where the arbitration clause provided that 'in case of any incompleteness of the contract, both parties shall reach settlement through friendly consultations. If settlement cannot be reached through consultations, the matter *may* be submitted for arbitration …' (Emphasis added.) A dispute arose between the parties. The plaintiff issued a writ which was duly acknowledged. The plaintiff obtained a judgment in default. The defendant then applied to set aside the judgment and to stay the proceedings in court on the basis of the arbitration clause. Kaplan J set aside the judgment and granted the stay, holding, inter alia, that:

> Once one party or the other has opted for arbitration, the other party is obliged to honour the agreement to arbitrate. If both parties agreed not to arbitrate but to litigate, they would be perfectly free to do so but the permissive word 'may' does not entitle the plaintiff to negate the defendant's wish to arbitrate. In this context, the word 'may' in effect means 'shall'.

(c) The Hong Kong case of *Tianjin Medical & Health Products*, where Kaplan J, in applying his own judgment in *China State Construction Engineering Corp*, rejected the submission that the permissive word 'may' was not a binding agreement to refer disputes to arbitration, and held that when the defendants elected to proceed by way of arbitration, then arbitration became mandatory for both parties. The arbitration clause reads:

> Arbitration
>
> All disputes in connection with this contract or the execution thereof shall be settled amicably by negotiation. In case no settlement can be reached, the case under dispute *may* then be submitted to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade for arbitration. The arbitration shall take place in China and shall be executed in accordance with the provisional rules of procedure of the said Commission and the decision made by the Commission shall be accepted as final and binding upon both parties for settling the disputes. (Emphasis added.)

(d) The Hong Kong case of *Private Company 'Triple V' Inc* where the plaintiff and defendants entered into contracts which provided that any unsettled disputes shall be referred to arbitration in Hong Kong in accordance with the provisions of the Arbitration Ordinance of Hong Kong. The trial judge's order in favour of resolution of the disputes by arbitration was affirmed by the Hong Kong Court of Appeal.

(e) The United States case of *Cravat Export Co v Taiwan Power Co USDC Eastern District of Kentucky* CA 90-11, 5 March 1990 (unreported)where the arbitration clause provides that 'Any dispute of whatever nature

arising out of or in any way relating to the agreement or to its construction or fulfillments may be referred to arbitration'. Forester J of the US District Court held that such a clause provides for permissive arbitration until one of the parties chooses to invoke the arbitration clause. When such an election is made by a party, the arbitration becomes mandatory for the parties.

(f) The Canadian case of *Balancing Pool*

(i) The relevant arbitration clauses provide as follows:

> 7.1 Either Party may, by notice to the other, require the issue to be addressed by senior officers of the respective Parties who shall endeavor within a period of 10 business days from the date of the notice to resolve the matter in dispute. In the event the senior officers are unable to reach a satisfactory resolution of the dispute within the aforesaid 10 business day period, then either Party *may*, by written notice, submit the dispute to arbitration to be conducted in accordance with the Alberta Arbitration Act.
>
> 7.3 Submission to Arbitration
>
> All disputes with respect to this Agreement *shall*, upon expiration of the ten (10) day period in Section 7.2, be forwarded to and resolved by binding arbitration in accordance with the Arbitration Act S.A. 1991, c. A-43.1 (the 'Arbitration Act'), by a board of arbitrators in accordance with the following provisions … (Emphasis added.)

(ii) Neil Whitmann CJ (of the Court of Queen's Bench of Alberta, Canada) held as follows:

> The use of the word '*may*' in an arbitration clause, …, does nothing more nor less than allow a party to the contract to exercise its discretion as to whether the arbitration process should be invoked. If neither party invokes it, it is not mandatory. But once either party invokes the arbitration process, the dispute will necessarily be referred to arbitration and arbitration is mandatory. (Emphasis added.)

(g) The Canadian case of *Canadian National Railway Co*, where the contract provides that the parties may refer any dispute thereunder to arbitration, in accordance with the Arbitration Act of Ontario. The buyer commenced an action for damages, and the seller moved to stay the action. The motion was dismissed. The seller's appeal to the Ontario Court of Appeal was allowed. Finlayson JA stressed at p 388 [14] that the meaning of the contract was: either party might elect for binding arbitration. Arbitration then becomes mandatory. Failing such an election by one of the parties, the matters in dispute can be resolved in the courts. The action was stayed and the dispute referred to arbitration.

(h) The Singapore case of *Tjong Very Sumito*, where the appellants and the respondent entered into a share sale and purchase agreement ('the SPA'), under which the appellants agreed to sell 72% of the paid-up share capital of a company, PT Deefu Chemical Indonesia, to the respondent. The SPA contained an arbitration clause which provided for 'all disputes, controversies and conflicts arising out of or in connection with [the SPA]' to be settled by arbitration under the SIAC Rules. The payment terms in the SPA were later varied by a supplemental agreement, under which the respondent was to, inter alia, pay Aventi Holdings Limited ('Aventi') US$3.7m on 13 June 2008. Aventi requested early settlement of the US$3.7m. The respondent, without notifying the appellants, acceded to Aventi's request and was granted a discount of US$207,200. Subsequently, the appellants' solicitors notified the respondent that the sum of US$3.7m was to be paid to the appellants, and that no further payments were to be made to Aventi. When the respondent failed to respond to this letter and the subsequent notice that court proceedings would be initiated if payment was not made to their clients, the appellants commenced proceedings for an injunction to restrain the respondent from effecting payment of the US$3.7m to any party other than the appellants, as well as for damages. After service of the writ, the respondent's solicitors replied, stating that the appellant's suit was misconceived as all disputes arising out of or in connection with the SPA were subject to a binding arbitration clause. The respondent then entered appearance and applied for a stay of court proceedings in favour of arbitration. The assistant registrar dismissed the respondent's stay application. However, the respondent succeeded on appeal, and was granted a stay of proceedings in favour of arbitration. The appellants appealed. In dismissing the appeal, VK Rajah JA held in paras [28] and [29] that the need to respect party autonomy, in deciding both the method of dispute resolution as well as the substantive law to govern the contract, had been accepted as the cornerstone underlying judicial non-intervention in arbitration. Courts should be slow to find reasons to assume jurisdiction over a matter that the parties had agreed to refer to arbitration. The whole thrust of the IAA was geared towards minimising court involvement in matters that the parties had agreed to submit to arbitration. Concurrent arbitration and court proceedings were to be avoided unless it was for the purpose of lending curial assistance to the arbitral process.

[25] I pause here to observe that the authorities in category (2) considered only the relevant arbitration clause without more, and only addressed the first part of the question for decision in the instant appeals. Had the relevant clauses in the instant appeals prescribed arbitration without any subsequent clauses viz 2.4 and 4.4 in DA2 and DA3 respectively, I would have had no difficulty whatsoever in affirming the stay granted by the High Court. However, the

relevant clauses herein go beyond the narrower compass in the authorities in category (2). Hence, I am of the view that they are not really helpful to me in my search for an answer to the above question for decision.

CONSTRUCTION OF ARBITRATION, GOVERNING LAW AND JURISDICTION CLAUSES

[26] The authorities in category (3) include the following:

(a) *R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia* [2009] 1 MLJ 572; [2009] 1 CLJ 708 (CA)

(i) The appellant, pursuant to a fall that had injured him, made a claim on a personal accident insurance policy provided by the respondent for the appellant. The respondent rejected the claim on the ground that the appellant failed to show that he suffered 'permanent disability' as defined by the policy. The appellant disagreed and sought to refer the matter to arbitration. He filed an originating summons ('OS') for an order to appoint an arbitrator to commence arbitration proceedings based on cl 10 of the policy which provides:

> Any dispute, difference or question which may arise at any time hereafter between the Company and the Insured touching the true construction of the Policy or the rights or liabilities of the parties hereto shall be the decision of a 28 single arbitrator of Malaysia to be agreed upon by the parties …

(ii) The respondent, however, declined to have the matter arbitrated and relied on cl 17 thereof which reads:

> This policy shall be governed by and interpreted in accordance with Malaysian Law. The Malaysian Courts shall have exclusive jurisdiction.

(iii) The respondent claimed that the effect of cl 17 was that it had the right to have the dispute litigated by the courts. The learned judge dismissed the appellant's OS primarily on the ground that there was want of an agreement to refer the matter to arbitration. Hence, the appellant's appeal.

(iv) In allowing the appeal, Suriyadi Halim Omar JCA, delivering the judgment of the court, held that:

(A) By virtue of cl 10, the parties agreed to resolve their differences by way of arbitration.

(B) Clause 17 did not confer upon the court the jurisdiction to decide on the parties' differences when they already consented to resolve them by way of arbitration. That policy

merely read that the terms of the policy and the interpretation thereof was to be governed by Malaysian law with the Malaysian court having the exclusive power to interpret it. Clauses 17 and 10 of the policy should be read harmoniously.

(v) I note that the above clauses are vastly different from those in the instant appeals.

(b) The English case of '*The Nerano*'

(i) On the face of the bill of lading, a clause provided:

> The conditions as per relevant charterparty dated 02.07.1990 are incorporated in this bill of lading and have precedence if there is a conflict. English Law and Jurisdiction applies.

(ii) Clause 1 of the conditions of carriage on the back of the document provided, inter alia:

> All terms and conditions liberties exceptions and arbitration clause of the Charterparty, dated as overleaf, are herewith incorporated.

(iii) The charterparty provided, inter alia:

> 24. The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English Law and Jurisdiction applies.
>
> 36. That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London England according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

(iv) The plaintiffs claimed damages in respect of alleged seawater damage and rusting said to have been caused to 71 of the coils. The writ was served on the defendants. The defendants contended that the contract of carriage contained in or evidenced by the bill of lading contained an arbitration clause and that they were entitled to a stay of the action under s 1 of the Arbitration Act 1975.

(v) Clarke J held that:

(A) the correct course was to give effect to all the provisions of the bill; if that attempt was made it led to the conclusion that effect could be given to both the clause on the front and the clause on the back of the bill of lading; there was some overlap but there was no conflict; the notion of English jurisdiction

was not inconsistent with a submission to arbitration if only because the English Court retained a supervisory jurisdiction over the arbitration which according to cl 36 was to take place in England; there was no reason to disregard the specific references in cl 1 to the incorporation of the arbitration clause; and

(B) the defendants were entitled to a stay of the action under s 1 of the Arbitration Act 1975.

(vi) The plaintiffs' appeal was dismissed by the English Court of Appeal, holding that:

(A) the reference to English jurisdiction could only be a reference to the English courts; the reference to English jurisdiction does not exclude an English arbitration agreement from being subject to English jurisdiction; the two provisions read together were not inconsistent with each other; and

(B) It could not amount to an agreement to abandon their right to a stay.

(vii)I note that the clauses in *'The Nerano'* were dissimilar from those which require construction in the instant appeals.

(c) The English case of *Axa Re*

(i) The relevant arbitration clauses read:

(i) This Contract shall be subject to English Law and Jurisdiction.

(ii) The seat of the arbitration shall be in London and the arbitration tribunal shall apply the laws of England as the proper law of this contract arbitration.

(ii) It was held by Gloster J that:

(A) In appropriate circumstances, an agreement that the English courts would have jurisdiction and an arbitration clause in the same contract were not necessarily irreconciliable.

(B) The jurisdiction clause was not necessarily exclusive because it did not require all disputes to be submitted to an English court. The reference to English jurisdiction operated in parallel with the arbitration provisions by fixing the supervisory court of the arbitration, that was to say the curial law or the law governing the arbitration in relation to matters arising in the course of the arbitration, and further fixed the appropriate court for proceedings after arbitration. The arbitration agreement was workable alongside the agreement

of the parties in the express wording of the reinsurance slip that there should be English jurisdiction. The two clauses were consistent with each other and it was not necessary impliedly to delete the arbitration clause or to regard it as trumped by the express wording of the jurisdiction agreement.

(iii) In my view, the aforesaid clauses are again plainly dissimilar when compared to the clauses which call for construction in the instant appeals.

(d) The English case of *Paul Smith International*

(i) Clauses 13 and 14 of the relevant agreement read:

> 13 SETTLEMENT OF DISPUTES If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference *shall* be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.
>
> 14 LANGUAGE AND LAW This Agreement is written in the English language and shall be interpreted according to English law.
>
> The Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit. (Emphasis added.)

(ii) Steyn J granted a stay of the plaintiff's claim in court and held that cl 13 was a self contained agreement providing for the resolution of disputes by arbitration; cl 14 specified the lex arbitri, the curial law or the law governing the arbitration which would apply to this particular arbitration; there was no inconsistency between cll 13 and 14 and both clauses were valid and binding.

(iii) In my view, cll 13 and 14 in *Paul Smith*, may be distinguished in that cl 13 uses the word 'shall' instead of the word 'may' which was used in the instant appeals. Further, by cll 13 and 14, the parties do not reasonably contemplate the existence of any conflict in the interpretation of these two clauses. However, in the instant appeals, the conflict in the interpretation of the arbitration clause and the 'submission to court jurisdiction clauses' are uppermost in the minds of the parties, as expressed in identical provisions viz 'in the event there is any conflict in the interpretation of the terms of the Principal Agreement and this agreement, the interpretation of the terms of this Supplemental Agreement shall prevail'. These

words are nowhere to be found in English authority which is therefore not of any assistance to me.

(e) The Hong Kong case of *Xu Yi Hong*

(i) Clause 9 of the rights transfer agreement entered into by the parties on 7 August 2004 provided that the parties unanimously agreed to refer any dispute arising from the agreement to arbitration by the Xiamen Arbitration Commission, whose decision should be binding on the parties. On the other hand, cl 6 of the supplemental agreement entered into on 18 August 2004 provided that its terms shall prevail over the rights transfer agreement should there be any inconsistency or conflict, while cl 7 stipulated the application of Hong Kong law to the supplemental agreement. The plaintiff commenced litigation based on two causes of action, one in contract and another in tort. The defendant applied for stay of court proceedings and for the dispute to be referred to arbitration. The deputy judge of the Hong Kong Court of First Instance granted a stay of proceedings and held, inter alia, that the choice of law provision was not strong enough to displace the express arbitration agreement.

(ii) I am of the view that the above clauses are different from the those in the instant appeals. Hence, the judgment of the learned deputy judge is not useful to KDSB.

AUTHORITY FAVOURING LITIGATION

[27] *Coop International Pte Ltd* comes within category (4).

(a) The appellant entered into a distributorship agreement with Ebel SA (the respondents) on 1 April 1995 which provided vide cl 12.2 for arbitration in Switzerland according to Swiss rules as a means to resolve their disputes. In July 1996, both parties terminated the distributorship agreement. They entered into a separate termination agreement dated 2 July 1996 with terms different from that provided in the distributorship agreement. The termination agreement did not provide for an arbitration clause and stated that the distributorship agreement would lapse after the respondents had appointed a new distributor. There was no dispute relating to the distributorship agreement, which was superseded by the termination agreement.

(b) On 4 September 1996, the parties reached a third agreement (4 September agreement) which was in the nature of a settlement agreement. By the time this agreement was signed, the distributorship agreement had lapsed.

(c) The 4 September agreement provided for the payment of a fixed sum by 4 October 1996. On or about 19 October 1996, the respondents remitted Swiss francs to pay for the amount owed to the appellants under the 4 September agreement, leaving a shortfall of S$422,546.65. The appellants claimed for this shortfall and applied for summary judgment. The respondents applied to stay the proceedings.

(d) The appellants opposed the respondent's application on the grounds, inter alia, that the parties' respective rights had been compromised under the 4 September agreement.

(e) The respondents' application was allowed by the assistant registrar who stayed all further proceedings pursuant to s 6 (Singapore).

(f) The appellants' appeal was allowed by Chan Seng Onn JC (Singapore) who held, inter alia, that:

(i) The parties had compromised their rights by the 4 September agreement in which no arbitration clause had been provided for; and

(ii) The 4 September agreement was signed in Singapore after extensive negotiations and stock checking in Singapore. Nothing in the agreement stated that the laws of Switzerland governed the agreement. Clearly, in the absence of anything else the agreement had to be governed by Singapore law and the Singapore courts would have jurisdiction to try any dispute arising under it. There was no question of staying the proceedings.

(g) The respondents' appeal to the Court of Appeal vide CA 38/98 was heard on 4 August 1998 before Yong Pung How CJ, Karthigesu and LP Thean JJA and dismissed.

(h) I note that while the above authority favours litigation, it does not concern the relevant clauses which are to be construed in the instant appeals.

CONSTRUCTION OF RELEVANT CLAUSES IN INSTANT APPEALS

[28] The instant appeals demonstrate the immense importance of drafting agreements and supplemental agreements generally, and arbitration and/or jurisdiction clauses specifically in order to reflect the true intention of the parties. As alluded to above, the relevant clauses to be construed in these appeals are different from those which had been construed in the above categories of authorities.

[29] By cl 11.1 ie the arbitration clause, the parties herein have agreed, first, to resolve any dispute or difference between them arising out of or in connection with DA1. If that attempt fails, they may then refer the dispute or difference to arbitration. The arbitration clause is however subject to the variations and modification in DA2. Clause 2.3 of DA2 provides that in the event of any conflict in the interpretation of the terms of DA1 and DA2, the interpretation of the terms of DA2 shall prevail. This brings me to the first limb of cl 2.4 of DA2 which sets out the application of the laws of Malaysia as the governing law for the purpose of construction. More importantly, by the second limb of cl 2.4, the parties have expressly agreed to 'submit to the jurisdiction of the Courts of Malaysia in all matters connected with the obligation and liabilities of the parties under' DA2. Under DA3 cll 4.3 and 4.4, the parties have expressly agreed and incorporated identical provisions as in DA2 cll 2.3 and 2.4. I am of the view that 'the submission to court jurisdiction clauses' in the subsequent supplemental agreements had taken a completely new dimension. I have no doubt that the parties have reaffirmed their express predominant agreement to submit to the court's jurisdiction and have effectively abandoned arbitration. Upon reading all these clauses conjunctively, I hold that there is a conflict in the interpretation of cl 11.1 in DA1 ie the 'arbitration clause' and 'the submission to the court jurisdiction clauses' in cll 2.4 and 4.4 in DA2 and DA3 respectively. They contradict each other because effect could not be given to enable these clauses to function harmoniously. They operate like discordant music in a chorus of legal expressions. It is simply impossible to have a concurrent and combined situation of arbitration and litigation. It is either arbitration or litigation.

[30] In addition, unlike the peremptory word 'shall', the permissive word 'may' used in the arbitration clause ie cl 11.1 of DA1 is capable of readily abandoning the discretion to refer to arbitration, and opting for litigation instead, as expressed and contractually agreed by the parties in the supplemental agreements DA2 and DA3 via 'the submission to court jurisdiction clauses' that 'the parties hereto hereby submit to the jurisdiction of the Courts of Malaysia in all matters connected with the obligation and liabilities of the parties under this Supplemental Agreement'. This construction is further strengthened when the parties have contractually agreed that the principal agreement DA1 including the word 'may' in the arbitration clause shall be read subject to 'the submission to court jurisdiction clauses' in the supplemental agreements which shall prevail. The irresistible conclusion is that while it is true the parties had originally intended to have the discretion to refer their disputes to arbitration, that discretion has been subsequently displaced, compromised or abandoned when they have expressly submitted to the jurisdiction of the court ie to litigate all matters connected with the obligation

and liabilities of the parties under DA2 and DA3 to which DA1 is subject. The High Court actions are therefore within the jurisdiction of our High Court.

[31] As the parties' original intention to proceed by way of arbitration had been subsequently abandoned, as expressed in cll 2.4 and 4.4 in DA2 and DA3 respectively, neither of them should be allowed to go back on their words. Hence, it would be unfair or unjust for KDSB to do so. In other words, the doctrine of estoppel may be invoked. This doctrine of estoppel has been succinctly stated by Lord Denning in the *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 at p 584 in the following words:

> When the parties to a transaction proceed on the basis of an underlying assumption (either in fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[32] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 345F–H, the Federal Court followed this estoppel principle. I would respectfully apply the same principle here.

[33] In my judgment, the arbitration clause has, by virtue of the submission to the court jurisdiction clauses, been rendered null and void, inoperative or incapable of being performed under s 10(1)(a). This is one of the exceptional circumstances in which eg estoppel may be appropriately invoked.

CONCLUSION

[34] On the above analysis of the authorities and statutory provisions, I hold that the parties had eventually intended to resort to litigation. My answer to the above question for decision is in the affirmative. Hence the High Court has erred in granting the stay. I therefore allow this appeal with costs of RM30,000, set aside the decision of the High Court and substitute it with an order that the High Court actions be litigated. Deposit to be refunded to PKA being the appellant.

[35] My learned brother Syed Ahmad Helmy JCA and my learned sister Zaharah bt Ibrahim JCA have respectively read this judgment in draft and expressed their unanimous agreement to make it the judgment of the court.

Appeal allowed with costs.

Reported by Kohila Nesan